Paper No. 14

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9/27/00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Kendall

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Serial No. 75/344,519

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Vaughn W. North and Peter M. de Jonge of Thorpe, North & Western, L.L.P. for David W. Kendall.

Steven R. Berk, Trademark Examining Attorney, Law Office 102 (Thomas V. Shaw, Managing Attorney).

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Before Hanak, Hohein and Chapman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

David W. Kendall has filed an application to register the mark "WRISTGLIDERS" for a "wrist support for [a] computer operator."[1]

[1] Ser. No. 75/344,519, filed on August 21, 1997, which alleges dates of first use of November 21, 1996.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to his goods, so resembles the mark "HANDGLIDER," which is registered for "wrist support pads for use with computer keyboards,"[2] as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed,[3] but an oral hearing was not requested. We affirm the refusal to register.

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[2] Reg. No. 1,897,407, issued on June 6, 1995, which sets forth dates of first use of September 2, 1992.

[3] Applicant, with his main brief, has attached as an exhibit a listing of information from a commercial database concerning 41 third-party registrations for marks which consist of or include the word "GLIDER" or its plural. Applicant asserts, in view thereof, that "[t]he 'glider' portion of the mark HANDGLIDER is not entitled to a broad scope of protection because it is in a crowded market since the word 'glider' is very commonly used in composite trademarks." The Examining Attorney, in his brief, has properly objected to consideration of such evidence as untimely under Trademark Rule 2.142(d). Moreover, and even if applicant had utilized the correct procedure for making third-party registrations of record, see, e.g., In re Consolidated Cigar Corp., 35 USPQ2d 1290, 1292 (TTAB 1995) at n. 3, it is settled that third-party registrations are not evidence that the marks which are the subjects thereof are in use and that consumers have learned to distinguish such marks on the basis of the differences therein. See, e.g., In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983). Finally, and in any event, even if we were to consider such evidence as properly constituting part of the record in this case, none of the third-party registrations is for goods in the computer field. Thus, it simply could not be said that the marks at issue herein coexist in a marketplace of similar "GLIDER"-based marks and should be given only a narrow scope of protection.

Turning first to consideration of the respective goods, there is no real question but that, in legal contemplation, applicant's goods and registrant's goods are identical. While applicant asserts that his "wrist support for [a] computer operator" is composed of three separate devices while registrant's "wrist support pads for use with computer keyboards" are single-piece devices, the fact remains that both products are wrist supports for computer keyboard users. Such goods would be sold through the same channels of trade, such as computer stores or by mail-order, to the same classes of purchasers, including ordinary consumers as well as business customers. Clearly, if the respective goods were to be marketed under identical or similar marks, confusion as to the source or sponsorship thereof would be likely to occur, particularly since such goods appear to be relatively inexpensive items which consequently would tend to be purchased without a great deal of care as to the maker of the product.

Turning, therefore, to the real issue in this appeal, which is the similarity or dissimilarity of the respective marks when considered in their entireties, applicant contends that there is no likelihood of confusion as to origin or affiliation because:

> [T]he marks in this matter are compound word marks that share in common

> one word which is highly suggestive of the nature of the goods to which the marks are applied. The word "glider" suggests that each product facilitates a gliding movement. In the final office action, the Examining Attorney did not dispute the fact that the "glider" portion of the marks is highly suggestive and therefore not entitled to a broad scope of protection.
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> However, the words "wrist" and "hand" suggest different things. While both are parts of the human anatomy, they are not the same part and are not used interchangeably to describe or suggest the same part of the human anatomy. In the final office action, the Examining Attorney makes the point very strongly that a wrist and hand "are closely related physiologically, one being the terminus of the other." Due to this relationship, the Examining Attorney concludes that they are interchangeable and should be treated as equivalents for purposes of likelihood of confusion analysis. In making this conclusion the Examining Attorney is in error.
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> Simply because the marks suggest similar or competing goods (as the Examining Attorney has argued) does not necessarily mean that the marks make the same commercial impression. By virtue of the differences between the marks, i.e. wrist and hand, a typical consumer will have the impression that the goods are competing and that the manufacturer has simply chosen a different solution to a similar problem.

Applicant consequently concludes that "the marks WRISTGLIDERS and HANDGLIDER do not have the same connotation or commercial impression."

In addition, applicant maintains that "just because the words 'wrist' and 'hand' may be deemed merely descriptive by the Examining Attorney does not mean that they cannot provide the basis of concluding that two marks are not confusingly similar." Specifically, applicant argues that:

> "[E]ven if the Examining Attorney deems the words "wrist" and "hand" to be merely descriptive of the underlying goods, they do create a significantly different commercial impression. As indicated above, the mark WRISTGLIDERS suggests that the manufacturer has solved the problem of providing support to computer operators by using two or more devices (thus "gilders" [sic]) to support the wrist. On the other hand, a consumer will recognize that the HANDGLIDER manufacturer has chosen to solve the problem of providing support to computer operators by using one device (thus "glider") to support the hand. Even though the Examining Attorney has deemed "wrist" and "hand" to be merely descriptive, the mark[s] WRISTGLIDERS and HANDGLIDER do ... create sufficiently different commercial impressions such that confusion is not likely.
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> Furthermore, the words "wrist" and "hand" have significantly different appearance. In fact the words "wrist" and "hand" do not have one letter in common. Since these significantly different words appear at the beginning of their respective marks, it is extremely unlikely that the appearance of the mark WRISTGLIDERS will be confused with HANDGLIDER.
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> Furthermore, the pronunciation of the word "wrist" is completely different from the pronunciation of the word "hand." In fact, as the words do not share any common letters[,] they do not share any common sounds. Therefore, since these differently

> pronounced words appear at the beginning of their respective marks, it is extremely unlikely that the sound or pronunciation of the mark WRISTGLIDERS will be confused with that of HANDGLIDER.

The Examining Attorney, on the other hand, contends that the respective marks "consist of an arbitrary term combined with two different, yet related descriptive terms." In particular, the Examining Attorney insists that, with respect to wrist supports for computer keyboard users, there is nothing in the record to show that the word "glider" is "commonly used in the industry to describe the aforesaid goods." In consequence thereof, the Examining Attorney maintains that "the mark HANDGLIDER is unique and therefore warrants a broader scope of protection." Moreover, as to the fact that the word "glider" is in the singular in such mark while it is in the plural in applicant's "WRISTGLIDERS" mark, the Examining Attorney takes the position that such fact is insufficient to distinguish the marks at issue, citing In re Pix of America, Inc., 225 USPQ 691, 692 (TTAB 1985).[4]

[4] In pertinent part, the Board stated therein that (footnote omitted): "As for the marks [NEWPORTS for women's shoes and NEWPORT for outer shirts,] except for the pluralization of applicant's mark[,] which is almost totally insignificant in terms of the likelihood of confusion of purchasers, the marks are essentially identical in sound, appearance and commercial impression."

In view thereof, and relying on various dictionary definitions of the words "hand" and "wrist"[5] as well as the specimens of use submitted by applicant, the Examining Attorney urges that the contemporaneous use of the marks "WRISTGLIDERS" and "HANDGLIDER" for wrist supports for computer keyboard users is likely to cause confusion as to source or sponsorship because (footnote omitted):

> The terms HAND and WRIST both identify the body parts with which the goods are to be used. Furthermore, the "hand" and "wrist" are closely related physiologically, one being the terminus for the other. The applicant's specimens reflect the intimate relationship between these body parts, instructing the user of its WRISTGLIDERS to "1) Find your Pisiform [pie-zeh-form] bone on the heel of your hand. 2) Rest your Pisiform bone (not the

[5] The definitions of record from Webster's II New Riverside University Dictionary in relevant part define "hand" as "**1. a.** The terminal part of the human arm below the wrist, including the palm, four fingers, and an opposable thumb and used for grasping and holding" and "wrist" as "**1. a.** The junction between the hand and forearm." As requested by the Examining Attorney in his brief, we also judicially notice that The American Heritage Dictionary of the English Language (3rd ed. 1992) similarly defines "hand" in pertinent part as "**1. a.** The terminal part of the human arm located below the forearm, used for grasping and holding and consisting of the wrist, palm, four fingers, and an opposable thumb." In addition, we judicially notice that, as shown by the excerpt attached to applicant's reply brief, Merriam Webster's Collegiate Dictionary lists "wrist" as meaning in relevant part "**1** : the joint or the region of the joint between the human and the arm or a corresponding part on a lower animal." It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., Hancock v. American Steel & Wire Co. of New Jersey, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

> centers of your wrist) on your Wrist Gliders." Thus it appears that the applicant's WRISTGLIDERS support a portion of the hand and not the wrist, as argued by the applicant. The interchangeability of the term "hand" and "wrist" in relation to hand and wrist supports is also evident in the registrant's identification of goods which states that its HANDGLIDER mark is used in conjunction with "wrist support pads." Because the human hand and wrist are connected and work in conjunction, the terms are used interchangeably. When used in connection with the term glider(s), the marks create the same commercial impression.

As a general proposition, our principal reviewing court has noted that "[w]hen marks would appear on virtually identical goods ..., the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994). In the present case, we are constrained to agree with the Examining Attorney that applicant's use of the mark "WRISTGLIDERS" for wrist supports for computer operators is likely to cause confusion with registrant's use of the mark "HANDGLIDER" in connection with such legally identical goods as wrist support pads for use with computer keyboards. While the respective marks are distinguishable on a side-by-side basis, the Examining Attorney is correct in pointing out that such a comparison is

not the proper test to be used in determining the issue of likelihood of confusion since it is not the ordinary way that consumers will be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general rather that a specific impression of trademarks or service marks. See, e.g., In re United Service Distributors, Inc., 229 USPQ 237, 239 (TTAB 1986); and In re Solar Energy Corp., 217 USPQ 743, 745 (TTAB 1983).

When considered in their entireties, it is readily apparent that the marks "WRISTGLIDERS" and "HANDGLIDER" are similar in sound and appearance, given the respective presence of the words "GLIDERS" and "GLIDER" in the marks. Moreover, contrary to applicant's argument, there is no material difference, in a trademark sense, between the singular and the plural form of a word.[6] Wilson v. Delaunay, 245 F.2d 877, 114

[6] The plural form of applicant's mark would appear to be reflective of the fact, as asserted by applicant and confirmed by the specimens of use, that applicant's goods include a pair of wrist supports, one for each hand, while the singular form of registrant's mark would seem to be indicative that its goods are sold in single unit packaging. See, e.g., In re Pix of America, Inc., supra at n. 4 ["For example, the pluralization here might be thought to reflect the

USPQ 339, 341 (CCPA 1957). Consequently, and while we agree with applicant that the words "WRIST" and "HAND" in the abstract are not "interchangeable" in meaning, they are similar enough, when respectively used in combination with the words "GLIDERS" and "GLIDER," as to result in marks which engender substantially similar overall commercial impressions. See, e.g., Bill Rivers Trailers, Inc. v. Thermo King Corp., 478 F.2d 1243, 177 USPQ 764, 765 (CCPA 1973) [mark "ZERO KING" for transport refrigeration equipment likely to cause confusion with similar mark "THERMO KING" for transport refrigeration equipment]; Aktiebolaget Electrolux v. Armatron International Inc., 999 F.2d 1, 27 USPQ2d 1460, 1463 (1st Cir. 1993) [mark "LEAF EATER" for leaf shredder is likely to cause confusion with mark "WEED EATER" for leaf blower/shredder/vacuum]; and Masterpiece of Pennsylvania, Inc. v. Consolidated Novelty Co., Inc., 186 USPQ 134, 137 (S.D.N.Y. 1975) [mark "ALPINE KING" for artificial Christmas trees likely to cause confusion with similar mark "MOUNTAIN KING" for artificial Christmas trees].

In particular, the marks "WRISTGLIDERS" and "HANDGLIDER" are not only structurally similar, in that the suggestive terms "GLIDERS" and "GLIDER" respectively follow

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fact that shoes are always sold in pairs, whereas outer shirts are not. See, e.g., Mushroom Makers Inc. v. R.G. Barry Corp., 580 F.2d

the words "WRIST" and "HAND," but such words, even if the former is not strictly viewed as part of the latter, are nevertheless so related in everyday experience, in that the human hand and wrist physiologically are interconnected and work in conjunction, that the respective marks as a whole engender substantially similar commercial impressions when used in connection with wrist supports for computer keyboards. Both applicant's goods and registrant's goods are in essence designed to rest or support a computer operator's wrists while allowing the hands to move freely or "glide" over a computer keyboard, thereby preventing or relieving the painful condition of carpal tunnel syndrome caused by repetitive keystrokes. Given the normal fallibility of human memory and the consequent lack of perfect recall, purchasers and prospective customers seeking to protect their hands and wrists while using computer keyboards would be likely to believe, in light of the substantial similarity in the commercial impression of the respective marks, that applicant's and registrant's goods have the same origin or are affiliated with or sponsored by the same source. Furthermore, even if consumers were to be cognizant of the differences between applicant's "WRISTGLIDERS" mark for his wrist supports for computer operators and registrant's "HANDGLIDER" mark for

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44, 199 USPQ 65, 67 (2d Cir. 1978) [MUSHROOM for misses' sportswear

wrist support pads for use with computer keyboards, it is still the case that they could reasonably believe, albeit erroneously, that the former constitutes a new product line from the makers of the latter or vice versa.

Decision: The refusal under Section 2(d) is affirmed.

E. W. Hanak

G. D. Hohein

B. A. Chapman
Administrative Trademark Judges,
Trademark Trial and Appeal Board

and MUSHROOMS for slippers, shoes and sandals.]"].